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7 ERIK W. H.,  
8 Plaintiff,  
9 v.  
10 KILOLO KIJAKAZI, Acting Commissioner  
11 of Social Security,  
12 Defendant.

Case No. 16-cv-07383-DMR

**ORDER RE PLAINTIFF'S COUNSEL'S  
MOTION FOR ATTORNEYS' FEES**

Re: Dkt. No. 38

12 The court has received the motion for attorneys' fees pursuant to 42 U.S.C. § 406(b)  
13 submitted by Plaintiff Erik W. H.'s counsel, Josephine Gerrard. [Docket No. 38.] Defendant  
14 Kilolo Kijakazi, Acting Commissioner of Social Security, filed a response. [Docket No. 39.]

15 In Gerrard's motion, she represents that Plaintiff was awarded \$179,011 in retroactive Title  
16 II benefits. She asks the court for a net award of \$25,753.00 in attorneys' fees that would be  
17 payable out of Plaintiff's past due benefits. This sum represents a total attorneys' fee award of  
18 \$44,753.00 minus \$19,000.00 in fees payable by the government pursuant to the Equal Access to  
19 Justice Act ("EAJA"), 28 U.S.C. § 2412(b), which the court previously awarded.<sup>1</sup> [See Docket  
20 No. 37.]

21 In this motion, Gerrard's interests are adverse to those of her client, because any fees that  
22 the court awards Gerrard pursuant to 42 U.S.C. § 406(b) will come from Plaintiff's past-due  
23 benefits. In other words, if the court grants Gerrard's motion and awards her fees, it will reduce

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26 <sup>1</sup> A claimant's attorney who is successful in obtaining both EAJA fees from the United States and  
27 an award under 42 U.S.C. § 406(b) (which comes out of past-due benefits) must "refun[d] to the  
28 claimant the amount of the smaller fee." *Gisbrecht v. Barnhart*, 535 U.S. 789, 796 (2002)  
(quotation omitted). Here, Gerrard asks the court to order the payment of attorneys' fees in the  
amount of \$44,753.00 with a credit to Plaintiff for the \$19,000.00 in EAJA fees previously paid to  
counsel.

1 the amount of past-due benefits that Plaintiff will receive from Defendant by \$25,753.

2 By no later than August 8, 2023, counsel shall serve Plaintiff with a copy of her motion  
3 and this order and shall file a proof of service. **The court grants Plaintiff until August 29, 2023**  
4 **to submit any objections to Gerrard's motion for attorneys' fees.** If the court does not receive  
5 any objection from Plaintiff by August 29, 2023 the court will decide Gerrard's motion based on  
6 the papers already submitted.

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8 **IT IS SO ORDERED.**

9 Dated: August 4, 2023

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12 Donna M. Ryu  
13 Chief Magistrate Judge

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United States District Court  
Northern District of California